

**COURT OF APPEALS
DECISION
DATED AND FILED**

February 17, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2014AP1227

Cir. Ct. No. 2009CI1

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT II**

IN RE THE COMMITMENT OF THEODORE K. SANDERFOOT:

STATE OF WISCONSIN,

PETITIONER-RESPONDENT,

V.

THEODORE K. SANDERFOOT,

RESPONDENT-APPELLANT.

APPEAL from orders of the circuit court for Winnebago County:
BARBARA H. KEY, Judge. *Affirmed.*

Before Neubauer, C.J., Reilly, P.J. and Gundrum, J.

¶1 PER CURIAM. Theodore Sanderfoot appeals from orders denying his WIS. STAT. § 980.09 (2013-14)¹ petition for discharge from his ch. 980 commitment and denying his motion for a new discharge hearing due to ineffective assistance of trial counsel. We agree with the circuit court that counsel was effective at the discharge hearing. We further conclude that the circuit court did not err in excluding references at the discharge hearing to the length of Sanderfoot’s extended supervision. We affirm.

¶2 In 2011, Sanderfoot was committed under WIS. STAT. ch. 980 as a sexually violent person.² In February 2013, Sanderfoot filed a WIS. STAT. § 980.09 petition seeking discharge from his ch. 980 commitment. The State’s burden at a discharge hearing is to show that the respondent continues to meet the criteria for commitment as a sexually violent person. WIS. STAT. § 980.09(3). A “sexually violent person” is “a person who has been convicted of a sexually violent offense ... and who is dangerous because he or she suffers from a mental disorder that makes it likely that the person will engage in one or more acts of sexual violence.” Sec. 980.01(7). The discharge hearing determines whether there is new evidence “from which a reasonable trier of fact could conclude that the petitioner does not meet the criteria for commitment as a sexually violent person.” *State v. Schulpius*, 2012 WI App 134, ¶35, 345 Wis. 2d 351, 825 N.W.2d 311. The jury found that Sanderfoot remained a sexually violent person, and the circuit court denied his discharge petition.

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

² The WIS. STAT. ch. 980 commitment petition was filed in 2009.

¶3 One of Sanderfoot’s appellate issues arises from trial counsel’s failure to object to expert opinion about Sanderfoot’s likelihood of reoffending over his lifetime using an extrapolation analysis based on actuarial tools.³ Sanderfoot sought a new discharge hearing due to ineffective assistance of counsel. After an evidentiary hearing, the circuit court rejected Sanderfoot’s ineffective assistance of counsel claim. Sanderfoot appeals.

¶4 Ineffective assistance of counsel has two components: deficient performance by counsel and prejudice to the defendant arising from that deficient performance. Sanderfoot had “the burden of proof on both components.” *State v. Smith*, 207 Wis. 2d 258, 273, 558 N.W.2d 379 (1997). We will not reverse the circuit court’s factual findings about counsel’s performance unless the findings are clearly erroneous. *State v. Sanchez*, 201 Wis. 2d 219, 236, 548 N.W.2d 69 (1996). Whether counsel performed deficiently and prejudicially are questions of law that we review de novo. *Id.* at 236-37.

¶5 We “will not second-guess a trial attorney’s ‘considered selection of trial tactics or the exercise of a professional judgment in the face of alternatives that have been weighed by trial counsel.’ A strategic trial decision rationally based on the facts and the law will not support a claim of ineffective assistance of counsel.” *State v. Elm*, 201 Wis. 2d 452, 464-65, 549 N.W.2d 471 (Ct. App. 1996) (citation omitted).

³ Extrapolation analysis uses actuarial tools that assess an individual’s sexual offense recidivism risk over a period of years and then extrapolates that risk over the individual’s lifetime. Testimony drawn from actuarial instruments has been upheld. *State v. Tainter*, 2002 WI App 296, ¶20, 259 Wis. 2d 387, 655 N.W.2d 538. Cross-examination is the means for challenging the weight and credibility of the actuarial instruments and the testimony based upon those instruments. *Id.*

¶6 On appeal, Sanderfoot argues that trial counsel should have objected to Dr. Tyre's rebuttal testimony in which he referred to, but did not rely upon, an extrapolation analysis that applies a multiplier of 1.2 or 1.3 to a ten-year re-offense rate to reach an opinion about a WIS. STAT. ch. 980 committee's lifetime re-offense risk. Sanderfoot also faults counsel for not filing a motion in limine to exclude specific extrapolation formulas, including multipliers.

¶7 In his discharge hearing testimony, Dr. Tyre referred to three extrapolation methods, but he did not use a specific model to extrapolate from actuarial tools, and he did not use a multiplier in forming his opinion that Sanderfoot satisfied the criteria for commitment as a sexually violent person. Dr. Rypma also mentioned a multiplier, but he opined that extrapolation analysis is unreliable and only offered a risk opinion to ten years, not lifetime. Dr. Woodley extrapolated to Sanderfoot's lifetime risk and opined that Sanderfoot did not meet the criteria for commitment as a sexually violent person. Dr. Elwood also extrapolated to a lifetime risk, and he also opined that Sanderfoot did not meet the commitment criteria.

¶8 At the hearing on Sanderfoot's ineffective assistance of counsel claim, trial counsel testified that she did not move to exclude extrapolation analysis based on actuarial instruments because one expert, Dr. Elwood, rendered a pre-hearing opinion that even employing extrapolation analysis, which he did not perform using a specific formula, Sanderfoot did not meet the criteria for continuing commitment as a sexually violent person. Trial counsel variously argued to the jury that extrapolation analysis was unreliable, and Sanderfoot no longer met the sexually violent person criteria.

¶9 Sanderfoot argued that his trial counsel should have objected because the 1.2 or 1.3 multiplier to which Dr. Tyre referred in the context of extrapolating to a lifetime re-offense risk was not scientifically valid. The State responded that in *State v. Sanderfoot*, No. 2012AP743, unpublished op. and order at 3 (WI App Feb. 20, 2013), the court held that the circuit court properly exercised its discretion at Sanderfoot's WIS. STAT. ch. 980 commitment trial when it admitted expert testimony based upon extrapolation analysis. The State further argued that Sanderfoot's discharge case partially relied upon Dr. Elwood, who employed an extrapolation analysis but still concluded that Sanderfoot did not meet the criteria for commitment as a sexually violent person.

¶10 We agree with the circuit court that trial counsel did not perform deficiently. The circuit court's finding that Sanderfoot's discharge hearing strategy was premised, in part, upon the lack of reliability of extrapolation analyses in general, is supported in the record and is not clearly erroneous. Trial counsel made a strategic decision not to object and to argue that the extrapolation analysis was unreliable for purposes of determining lifetime re-offense risk, and even if reliable, Dr. Elwood opined that Sanderfoot did not meet the criteria for commitment as a sexually violent person.

¶11 Trial counsel made a strategic decision and did not perform deficiently. *Elm*, 201 Wis. 2d at 464-65. The circuit court properly rejected Sanderfoot's ineffective assistance of counsel claim. *State v. Kimbrough*, 2001 WI App 138, ¶26, 246 Wis. 2d 648, 630 N.W.2d 752 (lack of deficient performance defeats an ineffective assistance of counsel claim).

¶12 Sanderfoot next argues that the circuit court erred when it excluded testimony about the length of his extended supervision, particularly because the

experts referred to extended supervision in forming their opinions. The circuit court precluded Sanderfoot from informing the jury about the length of his extended supervision to support his argument that being on extended supervision until January 2031 would be a protective factor. Citing *State v. Mark*, 2006 WI 78, 292 Wis. 2d 1, 718 N.W.2d 90, the circuit court reasoned that evidence regarding extended supervision was not relevant under *Mark* and would invite the jury to speculate about the conditions for release to the community and the level of supervision Sanderfoot would have or would be required to have to reduce his re-offense risk.

¶13 On appeal, Sanderfoot argues that *Mark* does not control and the circuit court erroneously excluded evidence relating to his extended supervision. We disagree. In *Mark*, the court held that the conditions of Mark's probation supervision were not relevant to whether he was a sexually violent person for purposes of a WIS. STAT. ch. 980 commitment proceeding. *Mark*, 292 Wis. 2d 1, ¶41.

¶14 Whether to exclude evidence was within the circuit court's discretion. *Id.*, ¶35. To the extent that any expert considered Sanderfoot's extended supervision term as part of his original commitment proceeding, that information is not new for the discharge proceeding.⁴ *Schulpius*, 345 Wis. 2d 351, ¶35. The length of Sanderfoot's extended supervision cannot be considered apart from the conditions under which he would be released and the type of supervision he would receive in the community. Because the length of extended

⁴ At Sanderfoot's commitment trial, two experts, Dr. Woodley and Dr. Barahal, testified that a lengthy period of extended supervision reduced Sanderfoot's re-offense risk.

supervision cannot be divorced from the release conditions, we decline Sanderfoot's invitation to read *Mark* as excluding only conditions of extended supervision, not the length of extended supervision.

¶15 The circuit court properly considered *Mark* and applied it to Sanderfoot's case. The circuit court did not misuse its discretion when it excluded evidence relating to Sanderfoot's extended supervision.

¶16 Having rejected both of Sanderfoot's appellate issues, we also reject his request for a new discharge trial.

By the Court.—Orders affirmed.

This opinion will not be published. See WIS. STAT. RULE 809.23(1)(b)5.

